No. 49075-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LERONE MAJOR, JR.,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. Defense counsel's failure to object to law enforcement characterization of Jazmine Graves as the victim denied Mr. Major effective assistance of counsel.

a. Defense counsel's representation was deficient.

Only legitimate trial strategies or tactics are adverse to a claim of ineffective assistance of counsel. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). Neither legitimate trial strategy nor legitimate trial tactics apply in Mr. Major's case.

Defense counsel demonstrated his deficiency by failing to follow through on his successful motion in limine prohibiting any witness from characterizing Jazmine Graves as the victim. CP 40 (Defense Motion in Limine 12); RP 5/9 at 9.

The State concedes that had defense counsel objected to Lacey Police Officer Joshua Bartz's opinion that Ms. Graves was the victim, the trial court would have granted the objection. See RP 5/11 at 38-39. Brief of Respondent at 4.

It can be a legitimate trial tactic to forego an objection if counsel wishes to avoid highlighting certain evidence. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). However, such is not the case here. Mr. Major's theory was that Ms. Graves, if not an aggressor

was at least an equal party in the dispute and physical confrontation. RP 5/12 at 150-76. By objecting to Officer Bartz's contrary testimony and victim characterization, defense counsel would have availed himself of the opportunity to (1) emphasize his defense theory and (2) discredit the officer's victim characterization by a successful objection.

There was no legitimate trial strategy for defense counsel's failure to object to the officer's improper testimony thus demonstrating counsel's deficiency in failing to object.

b. Defense counsel's deficiency prejudiced Mr. Major.

This court recognizes the persuasive power of law enforcement opinion evidence. *State v. Farr-Lenzini*, 93 Wn. App. 453, 461, 970 P.2d 313 (1999) (trooper testimony on driver's state of mind inadmissible opinion evidence). Here the jury was charged with making a choice between two contrasting theories: Ms. Graves as a victim of Mr. Major's assaultive rage (prosecutor theory), or Ms. Graves as an equal participant, and the likely aggressor in, effectively, a mutual donnybrook (defense theory). RP 5/12 at 164-81. As Officer Bartz was not a witness to the events, he was a neutral party until he took sides and offered his opinion that Ms. Graves was the victim. RP 5/11 at 38-39. Officer Bartz's unchallenged

characterization of Ms. Graves as the victim likely tipped the scales for conviction.

Defense counsel's failure to object to the inadmissible opinion evidence denied Mr. Major effective assistance of counsel. Mr. Major's convictions should be reversed and remanded.

2. Mr. Major cannot be ordered to serve any additional community custody on the gross misdemeanors because he is serving the maximum 364 day sentence on each.

Whether a sentencing court imposed an unauthorized sentence is a question of law we review de novo. *State v. Murray*, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). Alleged sentencing errors are reviewed based on the principles that (1) a sentence in excess of statutory authority is subject to collateral attack and (2) a defendant cannot agree to punishment in excess of statutory authority. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 873–74, 50 P.3d 618 (2002).

Under RCW 9.95.210(1)(a), a sentencing court may suspend a portion of a defendant's sentence and impose sentencing conditions. However, a court may not impose sentencing conditions when it does "not actually suspend any jail time." *State v. Gailus*, 136 Wn. App. 191, 201, 147 P.3d 1300 (2006), *overruled on other grounds by State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009). Accordingly, where the sentencing court

imposes the maximum term for an offense, it lacks the authority to impose probation or other sentencing conditions. *Gailus*, 136 Wn. App. at 201.

Gailus was sentenced to 12 months in jail for ten felony convictions. Gailus also received the maximum one year sentence for each of two gross misdemeanor convictions. The trial court ordered the gross misdemeanor sentences run consecutively to each other and consecutively to his felony convictions. *Id*. at 200-01. The trial court also purportedly suspended the two 12–month jail sentences on the two gross misdemeanor convictions on the condition that Gailus serve 24 months in custody and complete 48 months of probation. *Id*. at 201. Thus, the trial court purported to suspend two consecutive 12–month jail sentences on the condition that the defendant serve 24 months in custody. *Id*. at 201. Because this sentence did not actually suspend any jail time, the requirement that Gailus complete 48 months of probation was not the result of a suspended sentence and had to be vacated. *Id*. at 201.

Here, like *Gailus*, the trial court ordered Mr. Major serve 19 months on count 3, the felony violation of the no contact order, concurrent with the four 364 day sentences on the gross misdemeanor counts 4, 5, 6, and 7. Section 4.5 of the judgment and sentence reflects:

> 4.5 CONFINEMENT OVER A YEAR. The defendant is sentenced as follows:
>
> (a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):
>
> 19 months on Count 3
> 364 days on Count 4
> 364 days on Count 5
> 364 Days on Count 6
> 364 Days on Count 7
>
> Actual number of months of total confinement ordered is: 19 months.

CP 29.

On the next page of the judgment and sentence, the court purportedly suspends all 364 days on each of the misdemeanors – counts 4, 5, 6, and 7 – for 364 days. But there was no time to suspend because the time is being served in DOC concurrent with the 19 months on the felony. *State v. Parsley*, 73 Wn. App. 666, 669, 870 P.2d 1030 (1994)(no time left to impose after defendant served all 10 years of suspended sentence).

The State's contrary interpretation of *Gailus* is error. Respondent's Brief at 13-14. Mr. Major's case should be remanded to strike the gross misdemeanor community custody.

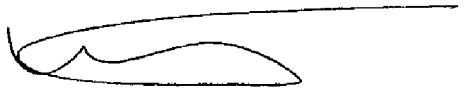
3. The State will not request appellate costs.

The State agrees it will not request appellate costs if Mr. Major does not substantially prevail on appeal. Brief of Respondent at 14.

B. CONCLUSION

Ineffective assistance of counsel requires reversal and remand. Alternatively, the court should strike the gross misdemeanor community custody.

Respectfully submitted April 18, 2017.



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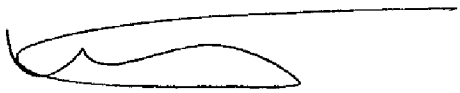
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares:

On today's date, I efiled the Reply Brief of Appellant to (1) Thurston County Prosecutor's Office, at paoappeals@co.thurston.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Lerone Major, Jr./DOC#391680, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed April 18, 2017, in Winthrop, Washington.



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